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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT TACOMA

11 ADAM GRADEN,

12 Petitioner,

13 v.

14 ELDON VAIL, ROB MCKENNA AND  
15 WARDEN F. E. FIGUEROA,

16 Respondents.  
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Case No. C08-5025 RBL/KLS

REPORT AND  
RECOMMENDATION

**NOTED FOR:**  
**August 22, 2008**

18 This habeas corpus action has been referred to United States Magistrate Judge Karen L.  
19 Strombom pursuant to Title 28 U.S.C. § 636(b)(1) and Local MJR 3 and 4. Adam Graden filed this  
20 action under 28 U.S.C. § 2254, challenging his 2005 plea and sentence. (Dkts. # 1 and 8<sup>1</sup>).  
21 Respondent filed an answer (Dkt. # 18), arguing, *inter alia*, that Mr. Graden's federal habeas corpus  
22 petition is time-barred based on 28 U.S.C. § 2244(d).

23 After careful review of the parties' submissions, the state court record and exhibits  
24 submitted by Respondents (Dkt. # 19, Exhibits 1-11), and the balance of the record, the undersigned  
25 agrees that Mr. Graden's petition is untimely.  
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28 <sup>1</sup>The habeas petition is filed at Dkt. # 1, an amended first page with the properly named  
Respondents is filed at Dkt. # 8.

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8 **I. STATEMENT OF THE CASE**

Mr. Graden is in state custody and confined at the North Fork Corrections Center in Sayre, Oklahoma. (Dkt. # 1). One June 3, 2005, Mr. Graden plead guilty to one count of first degree burglary, one count of theft of a firearm, and one count of unlawful possession of payment instruments. (Dkt. # 19, Exh. 1). On June 20, 2005, the trial court sentenced Mr. Graden to 100 months in prison and 18-36 months of community custody. *Id.*, Exh. 2.

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16 **A. State Court Procedural History**

Mr. Graden's judgment and sentence was entered on June 20, 2005. *Id.*, Exh. 2. On June 19, 2006, Mr. Graden filed a personal restraint petition with the Washington State Supreme Court. *Id.*, Exh. 4. On September 1, 2006 the Washington State Supreme Court transferred the Personal Restraint Petition to the Court of Appeals, Division II. *Id.*, Exh. 5. On April 19, 2007, a three judge panel entered an order that dismissed Mr. Graden's personal restraint petition, but remanded the case back to the Superior Court for purposes of correcting a clerical error in the judgment and sentence. *Id.*, Exh. 6.

On May 2, 2007, Mr. Graden signed a motion for discretionary review of the Court of Appeals' decision dismissing his personal restraint petition. *Id.*, Exh. 7. On July 24, 2007, the Commissioner of the Washington Supreme Court entered a ruling denying review. *Id.*, Exh. 8. Mr. Graden sought modification of the Commissioner's ruling. *Id.*, Exh. 9. On October 2, 2007 the Washington State Supreme Court denied Mr. Graden's motion to modify. *Id.*, Exh. 10.

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28 **B. Federal Court Proceedings**

On December 31, 2007, Mr. Graden filed his petition for writ of habeas corpus in this Court, seeking the following grounds for relief:

- 1) Whether Petitioner was deprived of his Sixth and Fourteenth Amendment rights to effective assistance of counsel and due process where counsel erroneously informed petitioner that his current sentence would be served concurrently with a prior conviction?

- 2) Whether Petitioner was deprived of effective assistance of counsel where counsel failed to (1) investigate the circumstances of a coerced consent search, and (2) move for suppression of the tainted evidence?
- 3) Whether Petitioner's Alford plea was voluntary and knowingly made where the documents associated with the conviction indicate a maximum sentence of ten-years, and the State Court changed that maximum sentence to life?
- 4) Whether Petitioner's base sentence in combination with his community custody/placement term exceeds the top-end of the standard range implicating due process protections?

(Dkt. # 2, p. 11).

## II. EXHAUSTION OF STATE REMEDIES

Respondent concedes that Mr. Graden has exhausted his habeas corpus claims pursuant to 28 U.S.C. § 2254(b)(2), by presenting them as federal constitutional violations to the Washington Supreme Court. (Dkt. # 19, Exh. 7).

## III. EVIDENTIARY HEARING

The decision to hold a hearing is committed to the court's discretion. *Williams v. Woodford*, 306 F.3d 665, 688 (9<sup>th</sup> Cir. 2002). The petitioner bears the burden of showing the need for a hearing. *Pulley v. Harris*, 692 F.2d 1189, 1197 (9th Cir. 1982), rev'd on other grounds, 465 U.S. 37 (1984); *Baja v. Ducharme*, 187 F.3d 1075 (9th Cir. 1999). A hearing is not required if the claim presents a purely legal question, or if the claim may be resolved by reference to the state court record. *Campbell v. Wood*, 18 F.2d 662, 679 (9th Cir.) (en banc), cert. denied, 114 S. Ct. 2125 (1994).

The question of whether Mr. Graden filed his petition within the one-year federal statute of limitations is a purely legal one that may be resolved by reference to the record before this court. Accordingly, an evidentiary hearing is not required.

## IV. DISCUSSION

REPORT AND RECOMMENDATION

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1     **A.     The Federal Statute Of Limitations, 28 U.S.C. § 2244(d)**

2             The Antiterrorism and Effective Death Penalty Act (AEDPA) established a statute of  
3 limitations for habeas corpus petitions. 28 U.S.C. § 2244(d). For petitioners whose state court  
4 judgments became final prior to April 24, 1996, the one-year time period began running on the date  
5 the statute was signed into law and expired on April 23, 1997. *Calderon v. United States Dist.*  
6 *Court for the Cent. Dist. of Cal. (Beeler)*, 128 F.3d 1283, 1287 (9th Cir. 1997), *cert. denied*, 522  
7 U.S. 1099 (1998). The statute of limitations is subject to equitable tolling, but such tolling “will not  
8 be available in most cases, as extensions of time will only be granted if ‘extraordinary  
9 circumstances’ beyond a prisoner's control make it impossible to file a petition on time.” *Id.* at  
10 1288 (citing *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996)).

12             Where the challenged conviction became final after April 24, 1996, the statute generally  
13 begins to run from one of the following four dates:

- 14             (A)     the date on which the judgment became final by conclusion of direct review  
15                     or the expiration of the time for seeking such review;
- 16             (B)     the date on which the impediment to filing an application created by State  
17                     action in violation of the Constitution or laws of the United States is  
18                     removed, if the applicant was prevented from filing such state action;
- 19             (C)     the date on which the constitutional right asserted was initially recognized by  
20                     the Supreme Court, if the right has been newly recognized by the Supreme  
21                     Court and made retroactively applicable to cases on collateral review; or
- 22             (D)     the date on which the factual predicate of the claim or claims presented could  
23                     have been discovered through the exercise of due diligence.

24             28 U.S.C. § 2244(d)(1).

25             Direct review ordinarily concludes either upon the expiration of the time for filing a petition  
26 for writ of certiorari, or when the Supreme Court rules on a petition for writ of certiorari. *Bowen v.*  
27 *Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999). A petitioner seeking review of a judgment of a lower  
28 state court must file the petition for writ of certiorari “within 90 days after entry of the order

1 denying discretionary review.” Sup. Ct. Rule 13(1). “The time during which a properly filed  
2 application for State post-conviction or other collateral review with respect to the pertinent  
3 judgment or claim is pending shall not be counted toward any period of limitation under this  
4 subsection.” 28 U.S.C. § 2244(d)(2).

5 The statute of limitations tolls only during the time a properly filed post-conviction,  
6 collateral challenge is pending in state court. 28 U.S.C. § 2244(d)(2); *Nino v. Galaza*, 183 F.3d  
7 1003 (9th Cir. 1999). A state court petition rejected as untimely is not ‘properly filed,’ and is not  
8 entitled to statutory tolling under section 2244(d)(2). *Pace v. DiGuglielmo*, 544 U.S. 408, 125 S.  
9 Ct. 1807, 1814 (2005).

11 It is Mr. Graden’s position that the statute did not start running until April 23, 2008, when  
12 the state court corrected his sentence. (Dkt. # 23, p. 5).<sup>2</sup> Mr. Graden argues that his sentence  
13 cannot be considered “final” for AEDPA purposes until he was resentenced. Mr. Graden is correct  
14 that the one-year time bar usually begins to run after entry of an *amended* judgment. *See, e.g.,*  
15 *Burton v. Stewart*, 127 S.Ct. 793 (2007). The record in this case reflects, however, that Mr. Graden  
16 was not re-sentenced. His judgment was merely remanded for correction of a clerical error. On  
17 April 19, 2007, the Washington Court of Appeals remanded “solely to correct the clerical mistake  
18 in section 2.3 of the judgment,” (Dkt. # 19, Exh. 6):

20 Petitioner’s judgment lists a maximum of ten years for his first degree  
21 burglary conviction. Petitioner urges that this proves that his sentence exceeds the  
22 maximum, making his judgment invalid. Petitioner also claims that his guilty plea  
documents recite the same ten year maximum, making his guilty plea involuntary.

23 As noted above, first degree burglary has a maximum of life imprisonment.  
24 The reference in the judgment to a ten year maximum is an error. But all of the other  
25 documents related to Petitioner’s judgment reveal that the parties knew and  
26 understood the maximum to be life imprisonment, not 10 years. The second  
27 amended information, to which Petitioner pleaded guilty, lists “[l]ife imprisonment”  
as the maximum. The incorrect maximum of 10 years is typed into the State’s

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28 <sup>2</sup>Mr. Graden also references an Appendix A, which was not attached to his traverse.

1 written offer ("Plea Agreement"), but the parties crossed out that maximum and  
2 interlineated the correct maximum of "life." Similarly, Petitioner's guilty plea  
statement originally listed the incorrect maximum, but Petitioner's lawyer corrected  
3 it so that it warned Petitioner of the maximum of "life."

4 The incorrect reference to a ten year maximum in the judgment is merely a  
clerical error. The State prepared the proposed judgment, and obviously based it on  
5 the Plea Agreement form. The same error regarding the maximum that appeared in  
the Plea Agreement appears in the judgment and sentence; it simply wasn't corrected  
6 in the judgment as it was in the Plea Agreement. All the parties knew the maximum  
to be life imprisonment. The remedy for this clerical error is neither reduction of  
7 Petitioner's first degree burglary sentence nor resentencing but instead remand to the  
sentencing court for simple correction of the scrivener's error. *See In re Pers.*  
8 *Restraint of Mayer*, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005); CrR 7.8(a). . . .

9 Finality of a criminal judgment is normally defined by imposition of the sentence. *See, e.g.,*  
10 *Flynt v. Ohio*, 451 U.S. 619, 620 (1981). On remand, the Supreme Court was not being asked to  
11 reweigh sentencing factors to come to an independent or different decision but merely to correct a  
12 clerical mistake made in reference to the maximum sentence sentence applicable to the crime. Mr.  
13 Graden's sentence remained unchanged.

14 Thus, Mr. Graden's judgment became "final" for § 2244(d) purposes no later than June 20,  
15 2005, the date he was sentenced following his guilty plea to the three crimes. *See* Exhibit 2; *see also*  
16 28 U.S.C. § 2244(d)(1)A). The one-year statute in this case began to run when Mr. Graden was  
17 sentenced on June 20, 2005. (Dkt. # 19, Exh. 2). The statute continued to run until Mr. Graden  
18 filed his personal restraint petition on June 19, 2006. *Id.*, Exh. 4. At that time, 364 days had  
19 elapsed. The statute of limitations was tolled from the time Mr. Graden filed his personal restraint  
20 petition (June 19, 2006), until the Washington Supreme Court issued its order denying Mr.  
21 Graden's motion to modify the Commissioner's ruling (October 2, 2007). *Id.*, Exh. 10; *See* 28  
22 U.S.C. § 2244(d).

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27 On October 2, 2007, the statute of limitations began to run again. Mr. Graden did not file  
28 his petition in this Court until December 31, 2007. Between October 2, 2007 and December 31,

1 2007, an additional eighty-nine days ran. Thus, from the date the trial court's judgment became  
2 final and the date that Mr. Graden filed his habeas petition, four hundred fifty-three days have  
3 passed.

4 Because Mr. Graden's federal petition was filed more than one year after his judgment  
5 became final, it is untimely under 28 U.S.C. § 2244(d) unless he is entitled to either statutory or  
6 equitable tolling of the statute of limitations.

### 7 **B. Equitable Tolling**

8 Equitable tolling under AEDPA is only appropriate where extraordinary circumstances  
9 beyond a prisoner's control made it impossible to file a petition on time. *Calderon v. United States*  
10 *Dist. Ct. (Beeler)*, 128 F.3d 1283, 1287 (9<sup>th</sup> Cir. 1997), overruled in part on other grounds by  
11 *Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530, 541 (9<sup>th</sup> Cir. 1998) (en banc). "External  
12 forces," not petitioner's "lack of diligence" must account for his failure to file a timely petition.  
13 *Miles v. Prunty*, 187 F.3d 1104, 1107 (9<sup>th</sup> Cir. 1999). Ignorance of the law, "even for an  
14 incarcerated pro se petitioner, generally does not excuse prompt filing." *Marsh v. Soares*, 223 F.3d  
15 1217, 1220 (9<sup>th</sup> Cir. 2000).

16 There are no grounds for equitable tolling in this case. There is no evidence of conduct by  
17 the Respondents that impeded Mr. Graden's ability to prepare and file his federal petition in a  
18 prompt fashion. There is no evidence of circumstances, such as a lack of clarity in the law or legal  
19 unavailability of claims preventing Mr. Graden from filing his habeas petition in a prompt fashion.

20 Accordingly, Mr. Graden's federal habeas petition is barred and must be dismissed under 28  
21 U.S.C. § 2244(d) .

## 22 **V. CONCLUSION**

23 This petition is time barred. Accordingly, the petition should be **DISMISSED WITH**

1 **PREJUDICE.** A proposed order accompanies this Report and Recommendation.

2 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure,  
3 the parties shall have ten (10) days from service of this Report and Recommendation to file written  
4 objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
5 objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time  
6 limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **August 22,**  
7 **2008**, as noted in the caption.  
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9 Dated this 8th day of August, 2008.

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12 Karen L. Strombom  
13 United States Magistrate Judge  
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